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**September 30, 2008**

**OFFICE OF HEARINGS AND APPEALS**

**Hearing Officer's Decision**

Name of Case: Personnel Security Hearing

Date of Filing: March 24, 2008

Case Number: TSO-0621

This Decision concerns the eligibility of XXXXXXXXXXXX (hereinafter referred to as "the individual") to hold an access authorization under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As set forth below, it is my decision, based on the evidence and testimony presented in this proceeding, that the individual's access authorization should be restored.

**I. Background**

The individual has been employed by a Department of Energy (DOE) contractor since 1989 and held an access authorization ("security clearance" or "clearance") as a requirement of his job. The contractor requested that DOE grant the individual a higher level clearance and, during a routine re-investigation, the individual reported that he had previously received in-patient treatment for depression. In August 2005, his clearance was suspended. DOE conducted a personnel security interview (PSI) in November 2005, but the PSI did not resolve the security concerns regarding the derogatory information and the local security office (LSO) recommended that the individual participate in a psychiatric evaluation conducted by a DOE consultant-psychiatrist. In February 2006, the psychiatrist diagnosed the individual with recurrent major depression. The DOE sent him a Notification Letter in August 2006 setting forth charges. Local DOE counsel uncovered additional derogatory information and DOE sent the individual a revised Notification Letter in February 2008. In February 2008, the LSO informed the individual how to proceed to resolve the derogatory information that had created a doubt regarding his eligibility for access authorization. Notification Letter (February 12, 2008). The Notification Letter stated that the derogatory information regarding the individual falls within the purview of 10 C.F.R. § 710.8 (h), (k), and (l) (Criteria H, K and L).

The LSO invoked Criterion H based on information in its possession that the individual has an illness or mental condition that causes or may cause a significant defect in his judgment or reliability. This allegation arose from the diagnosis of a DOE consultant-psychiatrist that the individual suffered from recurrent major depression.

The LSO invoked Criterion K based on information in its possession that the individual has allegedly trafficked in, sold, transferred, possessed, used, or experimented with a drug or other substance listed in the Schedule of Controlled Substances except as prescribed or administered by a physician or as otherwise authorized by Federal law. 10 C.F.R. § 710.8 (k). DOE invoked Criterion K based on information in its possession that the individual used illegal drugs between 1971 and 1988.

Criterion L is concerned with information in the possession of DOE that indicates that the individual has engaged in unusual conduct and is subject to circumstances which tend to show that he is not honest, reliable, or trustworthy or which furnish reason to believe that he may be subject to pressure, coercion, exploitation, or duress which may cause him to act contrary to the best interests of the national security. 10 C.F.R. § 710.8 (l). With respect to Criterion L, the Notification Letter refers to derogatory information that raises concerns about the individual's honesty, reliability and trustworthiness. Specifically, the individual completed security forms in 1989 and April 2005 that did not disclose his use of illegal drugs. He also allegedly provided discrepant information about his drug use in an October 2005 security supplement form.

In a letter to DOE Personnel Security on March 3, 2008, the individual exercised his right under Part 710 to request a hearing in this matter. 10 C.F.R. § 710.21(b). The Director of OHA appointed me as Hearing Officer in this case. After conferring with the individual and the appointed DOE counsel, 10 C.F.R. § 710.24, I set a hearing date. At the hearing, the individual, who was not represented by counsel, testified on his own behalf and elected to call four other witnesses. DOE counsel called the DOE consultant-psychiatrist and a personnel security specialist as witnesses. The transcript taken at the hearing shall be hereinafter cited as "Tr." Various documents that were submitted by the DOE counsel during this proceeding constitute exhibits to the hearing transcript and shall be cited as "Ex." Documents that were submitted by the individual during this proceeding are also exhibits to the hearing transcript and shall be cited as "Ind. Ex."

## **II. Analysis**

The applicable regulations state that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable or unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Although it is impossible to predict with absolute certainty an individual's future behavior, as the Hearing Officer I am directed to make a predictive assessment. There is a strong presumption against the granting or restoring of a security clearance. See *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for the granting of security clearances indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance).

I have thoroughly considered the record of this proceeding, including the submissions of the parties, the evidence presented and the testimony of the witnesses at the hearing

convened in this matter. In resolving the question of the individual's eligibility for access authorization, I have been guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c): the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledgeable participation; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the voluntariness of the participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuance or recurrence; and other relevant and material factors. After due deliberation, I find that the individual's access authorization should be restored because I conclude that such a restoration would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings that I make in support of this determination are discussed below.

### **A. Findings of Fact**

From age 16 in 1971 through the early 1980s, the individual occasionally used illegal controlled substances.<sup>1</sup> According to the individual, he stopped using drugs in late 1983 or early 1984, at the age of 28. Ex. 7. In 1989, the individual began working for the contractor and completed the required paperwork for an access authorization--a Questionnaire for Sensitive Positions (QSP) and a contractor-issued Security Supplement Form (SSF). Ex. 21, 22. The QSP (the DOE form) asked the individual to indicate if he had used drugs in the last five years, and he marked "No." Ex. 21. The SSF (the contractor form) asked if he had ever used drugs at any time, and he also marked "No." Ex. 22. Around 1990, the individual began to experience symptoms of depression. Ex. 14. In 1995, the individual began to consult his doctor about problems with his wife and children. Ex. 3 ( PSI) at 5. The doctor put the individual on medication. PSI at 27. The individual then went to see a psychiatrist who continued the medication but also suggested that the individual try electro-convulsive therapy treatments (ECT). *Id.* at 6, 13. In 2000, he spent three weeks in a local medical center and was then out of work for three months recovering. PSI at 14-15. He continued with that psychiatrist for approximately three years, until she closed her practice. PSI at 23. In 2001, his psychiatrist diagnosed the individual as suffering from recurrent major depression. Ex. 14. The individual began to see his current psychiatrist in October 2004 when he was having trouble with his family and some co-workers. PSI at 28, Ex. 16 at 7.

In February 2005, the individual was on short-term disability after some additional ECT treatments. Ex. 13. In April 2005, the individual completed a Questionnaire for National Security Positions (QNSP) for a higher level clearance, and on that form denied using drugs in the last five years. Ex. 16. During the background investigation, DOE found that the individual had been treated for depression in 2000. PSI at 7, 38. Between February 2005 and December 2005, the individual saw a counselor, at the recommendation of his psychiatrist, for eight one-hour sessions.

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<sup>1</sup> The LSO and the individual disagree on the date that the individual stopped using illegal drugs. The individual alleges that this drug use stopped in late 1983 or early 1984, around age 29. The DOE psychiatrist maintains that the notes of his interview with the individual indicate that the individual stopped using drugs in 1988 at age 33.

In October 2005, the individual completed another SSF, but in response to the question had he ever used drugs, he responded “Yes,” and disclosed that he had last used illegal drugs in 1984. Ex. 18.<sup>2</sup> That month, DOE suspended the individual’s clearance. Ex. 2. In November 2005, the individual participated in a personnel security interview. Ex. 3 (PSI). In February 2006, a DOE consultant psychiatrist diagnosed the individual with recurrent major depression. Ex. 10. The individual also disclosed his past drug use to the DOE psychiatrist. *Id.* Although he was stable for one year on two medications, the DOE psychiatrist was concerned that the individual did not comply with the follow-up portion of his treatment plan. *Id.* In April 2006, the DOE psychiatrist concluded that the individual was still suffering from major depression. Ex. 8. The individual’s psychiatrist, however, found that the individual had been free of any symptoms of depression for at least three months prior to July 2006. Ex. 6. In August 2006, the LSO sent the individual a Notification Letter. Ex. 2. In October 2007, the individual’s psychiatrist found that the individual’s depression remained in remission. Ex. 5. In January 2008, the DOE psychiatrist reviewed medical records from the individual’s psychiatrist and found that his depression was in remission, but could not conclude that there was a low probability of recurrence or exacerbation. Ex. 4. The LSO sent the individual a second Notification Letter in February 2008. Ex. 1.

## **B. DOE’s Security Concerns**

Based on the diagnosis of the DOE psychiatrist, I find that the LSO properly invoked Criterion H in suspending the individual’s security clearance. As observed by Hearing Officers in similar cases, a diagnosis of a mental condition raises serious security concerns. “Emotional, mental, and personality disorders can cause a significant defect in an individual’s psychological, social and occupational functioning. These disorders are of a security concern because they may indicate a defect in judgment, reliability, or stability.” *Personnel Security Hearing*, Case No. TSO-0565, 29 DOE ¶ 82,782 (2007) (citing *Personnel Security Hearing*, Case No. VSO-0224, 29 DOE ¶ 82,860 at 86,035 (2005)). See also Attachment to Memorandum from Assistant to the President for National Security Affairs, “Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information,” at ¶ 28 (b) (December 29, 2005) (Revised Adjudicative Guidelines).

Criterion K deals with the use of illegal drugs. Illegal drug use may cause an individual to act in a manner that is inconsistent with the best interests of national security while under the influence of such substances. See Revised Adjudicative Guidelines at 11. Also, illegal drug use indicates a willingness to ignore the law that could be reflected in the clearance holder’s attitude toward security requirements. See, e.g., *Personnel Security Hearing*, Case No. VSO-0448, 28 DOE ¶ 82,816 (2001); *Personnel Security Hearing*, Case No. VSO-0350, 28 DOE ¶ 82,756 (2000). The individual’s drug use is well documented in the record, and validates the charges under Criterion K.

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<sup>2</sup> The file also contains an SSF that is unsigned and undated, but indicates that the individual had been treated for depression for the previous 10 years. Ex. 19.

As for Criterion L, the LSO alleges that the individual failed to list his use of illegal controlled substances on an SSF and a QSP completed in 1989, and on an undated SSF that may have been completed in April 2005. When he completed a third security supplement form in October 2005, the individual disclosed his drug use. However, the LSO alleges that the information the individual provided about his drug usage on the third SSF was not consistent with the information that he provided to the psychiatrist in February 2006. The individual was not reliable or trustworthy when he furnished discrepant information and did not fully disclose his drug use during the processing of his application. This behavior demonstrates an unwillingness to comply with rules and regulations which indicates that the individual may not properly safeguard protected information. See Revised Adjudicative Guidelines at 8. Thus, the security concern under Criterion L is also valid.

## **C. Hearing Testimony**

### **1. The Individual**

The individual testified that he disclosed his drug use on the contractor-issued SSF in October 2005 for two reasons: (1) because the SSF, unlike the DOE forms he had completed in the past, asked about lifetime drug use; and (2) because he had become religious and decided to tell the truth about his past. Tr. at 18-19. However, the individual argued that he did not use drugs in the five years prior to signing the QSP dated June 1989. Tr. at 119-121. He maintains that he stopped using drugs in late 1983 or early 1984, around the age of 29. *Id.* at 121. Thus, when he signed the QSP in June 1989, he answered truthfully when he stated that he had not used drugs in the five years preceding his completion of the QNSP. *Id.* at 119-121. He admitted that he did not disclose his drug use on the 1989 contractor-issued SSF because he was a single parent and needed the job. *Id.* at 125.

The individual testified that he has a good relationship with his wife, a nurse who works for a neurologist. At times, his wife's employer had filled his prescriptions. His wife helps him to recognize if he is showing symptoms of depression and advises him when he needs to see the doctor. He has a very good relationship with his current psychiatrist, who has treated him for several years, and has asked him to return every six months. Tr. at 81.

### **2. The Personnel Security Specialist**

The personnel security specialist testified about her interview with the individual in November 2005. She testified that the individual's file came to her because of the in-patient hospitalizations in 2000 that had not been reported to the LSO. Tr. at 198. Based on unresolved issues from the PSI, the personnel security specialist recommended a psychiatric evaluation. *Id.* at 199. She also explained that the individual's file was sent to OHA in 2006, but had not been assigned a Hearing Officer. *Id.* at 207. The LSO asked the DOE psychiatrist for an update of his treatment.<sup>3</sup> *Id.* at 211. She noted that the individual completed a form on October 2005 prior to his evaluation. *Id.* at 200. She was

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<sup>3</sup> The LSO mitigated the non-reporting aspect because the individual had reported to his medical department, even though he was supposed to report that information to LSO security. *Id.* at 214.

present during the entire hearing. After listening to all of the testimony, the personnel security specialist concluded that she still had concerns about the individual's alleged dishonesty regarding his drug use, and was not convinced that the individual has sufficient motivation to comply with his treatment if he were to suffer a stressful situation or lose the support of his wife. *Id.* at 271.

### **3. Character Witnesses**

The individual's colleagues testified that he was an honest, reliable worker. They saw no evidence of drug use, or any erratic behavior. Tr. at 42, 64. The individual's supervisor attends his church, and confirmed that the individual joined the church recently and is very serious about his new faith. *Id.* at 62.

The individual's wife of 18 years testified that the family was financially secure despite the expensive medical treatment that the individual had undergone in 2005. Tr. at 175-176. She has been a nurse for 20 years and works for a local doctor. *Id.* at 185. Her husband was under a lot of stress in the three years since his clearance was suspended, but she felt that he has handled the stress very well. She testified that the individual is very honest and trustworthy and a good provider. *Id.* at 179. The wife testified that the individual's shift work made his depression more severe. *Id.* at 180, 184. She confirmed that the individual was on medication prior to seeing a psychiatrist *Id.* at 185. She understands that the individual has depression and will never be able to stop taking medication. The wife maintained that she and the individual have worked hard to keep his illness under control and to comply with his treatment plan. *Id.* at 187. He visited his first psychiatrist over 10 years prior to the hearing. He has seen his current doctor for three or four years. He sees his current psychiatrist when the psychiatrist asks him to, about every three to six months. To her knowledge, her husband has never missed an appointment, but he has forgotten one. She does not believe that he missed the appointment on purpose. *Id.* at 190-1. She reminds her husband about appointments usually. He went to see a psychiatrist because he knows he needs help. She testified that they have a good system to avoid him missing appointments. She feels that her husband has been stable with his most recent psychiatrist. *Id.* at 195-6.

### **4. The Psychiatrists**

The individual's psychiatrist testified that in December 2004, he diagnosed the individual with depression in remission. Tr. at 137. He recommended that the individual take three additional ECT sessions. According to the psychiatrist, the individual responded well to the ECTs. *Id.* at 142. He described the individual as somewhat conservative about reaching out for help and displaying some history of not returning on time for his follow-ups. *Id.* at 140, 147. The individual thought he was doing fine, but returned because of pressure from DOE. *Id.* at 151. The individual was able to get antidepressants from his primary care physician when he did not see his psychiatrist. The psychiatrist concluded that although the individual will experience future episodes of depression, he has responded well to treatment and he and his wife know the symptoms of an approaching episode. *Id.* at 158. He maintains that the individual's depression is in remission and that the individual and his wife are good at contacting him if a depressive episode is coming on. *Id.* at 159-60. The

individual knows what to do if he has a relapse based on a stressful incident. *Id.* at 166. He recommends that the individual return for visits every six months. *Id.* at 148-150. The psychiatrist testified that his current diagnosis of the individual is major depression, recurrent, in remission. *Id.* at 169-70.

The DOE psychiatrist was present during the entire hearing and testified at the end of the hearing that his diagnosis of the individual in February 2006 was recurrent major depression, a disorder with a substantial risk of a significant defect in judgment or reliability. *Id.* at 238. He testified that ECT treatments are used when the response to medication is inadequate, but that ECT is a good treatment with a good success rate. *Id.* at 239. In April 2006, he updated his opinion that the individual still suffered with recurrent major depression and possibly bipolar depression. The DOE psychiatrist at first had concerns with the frequency of the individual's visits to his psychiatrist and recommended visits every three to four months. However, after listening to the testimony of the individual's psychiatrist, the DOE psychiatrist was comfortable with the current treatment plan of visits every six months. He explained that "having seen the caliber of this psychiatrist and the fact that the psychiatrist seems, you know, motivated to help the man and knows him personally – then you see his wife who fits the same category – I do believe that lessens my concern that if he did take a relapse, that he would get treatment quickly." *Id.* at 246. He testified that the individual's major depression was in remission for about three years prior to the hearing, and that there is a lower probability of recurrence every year that he is in remission. *Id.* at 267-8. In conclusion, the DOE psychiatrist testified that his concerns were mitigated by: (1) the length of time of the individual's remission; (2) the support and concern of the individual's psychiatrist; and (3) the support and concern of the individual's wife. *Id.* at 268. The testimony of the individual's wife and the treating psychiatrist resolved any doubts that the individual was not compliant with his treatment plan. Consequently, the DOE psychiatrist concluded that the individual no longer poses a Criterion H concern. *Id.* at 269.

## **D. Mitigation of Security Concerns**

### **1. Criterion H – Significant Defect in Judgment or Reliability**

The LSO invoked Criterion H because the DOE psychiatrist diagnosed the individual with major depression. For the reasons that follow, I find that this concern has been mitigated.

First, both the individual's psychiatrist and the DOE psychiatrist have concluded that the individual's major depression is in remission. The DOE psychiatrist is satisfied that the individual is in the appropriate treatment, and that he is complying with that treatment plan. In similar cases involving a diagnosis of a depressive disorder, Hearing Officers have held that the security concerns were resolved where there was agreement of the psychiatric experts that the disorder was in remission. See *Personnel Security Hearing*, Case No. TSO-0655, 29 DOE (2007); *Personnel Security Hearing*, Case No. TSO-0072, 28 DOE ¶ 82,960 (2004); *Personnel Security Hearing*, Case No. TSO-0405, 29 DOE ¶ 82,976 (2006). Both experts agree in this case.

Second, the concern has been mitigated by counseling and treatment, in addition to a favorable prognosis by a duly qualified mental health professional. See Adjudicative Guidelines, ¶ 29 (b). Finally, the record contains a recent opinion by a duly qualified mental health professional employed by the U.S. government that the individual's condition is in remission, and has a low probability of recurrence or exacerbation. See Adjudicative Guidelines, ¶ 29 (c). I find no evidence in the record to contradict the conclusions of the psychiatrists. The individual and his wife testified that he has not had symptoms of depression in several years, and that he has a good relationship with his psychiatrist and plans to continue his treatment plan. Both spouses acknowledged the seriousness of the disorder, and appear committed to follow the advice of the treating psychiatrist. Therefore, I conclude that the individual has mitigated the security concerns of Criterion H.

## **2. Criterion K – Drug Use**

According to the regulations, I must rely on the record and my observations at the hearing, and make a common-sense judgment on this matter as directed by 10 C.F.R. § 710.7(c). After carefully reviewing the record and the Revised Adjudicative Guidelines, I find that the individual has mitigated the security concerns regarding his use of illegal drugs based on the passage of time. See Adjudicative Guidelines, Guideline H, ¶ 26 (a). He has not used illegal drugs in over 20 years prior to the hearing. Second, the individual has demonstrated his intent not to use drugs in the future by demonstrating an appropriate period of abstinence. See Adjudicative Guidelines, Guideline H, ¶ 26 (b). See *Personnel Security Hearing*, Case No. TSO-0625, 29 DOE ¶ \_\_\_\_ (September 10, 2008) (finding that 15 months of abstinence lends credence to testimony of individual that she does not intend to use drugs in future). In summary, the individual has convinced me through his testimony and his demeanor that there is little likelihood that he currently uses illegal drugs or will use them again. His use of illegal drugs occurred so long ago and his current lifestyle is so different that the drug use is unlikely to recur. For the reasons set forth above, I conclude that the individual has mitigated the Criterion K security concerns in the Notification Letter.

## **3. Criterion L- Unusual Conduct**

The Criterion L concerns were based on the individual's failure to list his drug use on security paperwork. This is a close case because there are factors that weigh for and against a finding of mitigation. The individual's behavior in failing to disclose his drug use on the initial SSF, and then maintaining that omission for 16 years, is a serious matter. He did not correct the SSF promptly before being confronted with the facts. See *Adjudicative Guidelines*, ¶ 7 (a). During that time, he could have been subject to exploitation, manipulation or duress. See Adjudicative Guideline, ¶16 (e).

On the other hand, the adjudicative process directs me to examine the individual's life and carefully weigh a number of variables known as the "whole person concept." See Adjudicative Guidelines, ¶ 2 (a). With that direction, I find several positive factors in this case. The individual revealed his previous drug use to DOE because of his commitment to the truth based on his new religious beliefs. There was no evidence in the record that DOE would have known of the individual's drug use had he not disclosed it on his 2005 SSF. The individual also took steps to eliminate his vulnerability to exploitation, manipulation or



duress by being open with his colleagues and family about his previous drug use and mental health treatment. Thus, it is unlikely that he could be blackmailed about these events. See *Adjudicative Guidelines*, 17 (e). Further, there is evidence in the record of permanent behavioral change. The individual has acknowledged his untrustworthy behavior and taken positive steps to alleviate the factors at its root. In the years since the individual completed his initial SSF, he has comported himself in an upright manner. He has matured and is married to a supportive spouse who provides stability in his life. He has joined a church that provides him with moral direction. He admitted at the hearing that he lied on his initial SSF, but that he told the truth in 2005 because of the teachings of his church.

After analyzing the variables and observing the individual and his witnesses at the hearing, I find that the unusual conduct is unlikely to recur. I conclude that the individual mitigated the security concerns about his honesty, reliability or trustworthiness when he made a good-faith effort to correct the omission and disclosed his illegal drug use on the October 2005 form. See also *Personnel Security Hearing*, Case No. TSO-0625, 29 DOE ¶ \_\_\_\_\_ (September 10, 2008) (finding that individual who admitted drug usage that DOE would not have known otherwise has mitigated Criterion L concern regarding honesty); *Personnel Security Hearing*, Case No. TSO-0079, 29 DOE ¶ 82,755 (2004) (self-reporting incidence of drug use mitigates Criterion L security concern). The individual told the truth without regard for any possible negative repercussions to his employment and has continued to do so. See also *Personnel Security Hearing*, Case No. TSO-0236, 29 DOE ¶ 82,880 (2005) (discussing importance of a subsequent pattern of responsible behavior where honesty is in question).

I also find that the individual provided truthful answers on his DOE security forms, the 1989 QSP and the 2005 QNSP. As regards the June 1989 QSP, the individual testified that he had not used drugs in the five years prior to completing that form, specifically since late 1983 or early 1984. See Ex. 7, 21. My observation of the individual's demeanor and my review of the record have convinced me that the individual testified credibly about the age at which he last used drugs. Even though the DOE psychiatrist noted his last drug use as 1988, the DOE psychiatrist could not remember the interview details. Therefore, I find that the individual answered his June 1989 QSP truthfully. See Ex. 21. The individual also answered his April 2005 QNSP truthfully when he stated that he had not used drugs in the last five years. Ex. 16.

For the reasons set forth above, I find that the individual has provided sufficient mitigation of the Criterion L security concern to remove any doubts about his reliability, honesty, or trustworthiness. See Guideline E, Section 17 (c).

## **II. Conclusion**

As explained in this Decision, I find that the DOE Operations Office properly invoked 10 C.F.R. § 710.8 (h), (k), and (l). However, the individual has presented adequate mitigating factors for all criteria that alleviate the legitimate security concerns of DOE security. Thus, in view of the criteria and the record before me, I find that restoring the individual's access

authorization would not endanger the common defense and security and would be consistent with the national interest. Accordingly, I find that the individual's access authorization should be restored. Any party may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Valerie Vance Adeyeye  
Hearing Officer  
Office of Hearings and Appeals

Date: September 30, 2008